

1 HOUSE BILL NO. 1908
 2 AMENDMENT IN THE NATURE OF A SUBSTITUTE
 3 (Proposed by the House Committee for Courts of Justice
 4 on _____)
 5 (Patron Prior to Substitute--Delegate Hope)

6 A BILL to amend and reenact §§ 19.2-169.1, as it is currently effective, and 19.2-169.2, as it is currently
 7 effective, of the Code of Virginia and to repeal the second enactment of Chapter 508 of the Acts
 8 of Assembly of 2022, relating to criminal proceedings; disposition when defendant found
 9 incompetent; evaluation for temporary detention.

10 **Be it enacted by the General Assembly of Virginia:**

11 **1. That §§ 19.2-169.1, as it is currently effective, and 19.2-169.2, as it is currently effective, of the**
 12 **Code of Virginia are amended and reenacted as follows:**

13 **§ 19.2-169.1. (Effective until July 1, 2023) Raising question of competency to stand trial or**
 14 **plead; evaluation and determination of competency.**

15 A. Raising competency issue; appointment of evaluators. — If, at any time after the attorney for
 16 the defendant has been retained or appointed and before the end of trial, the court finds, upon hearing
 17 evidence or representations of counsel for the defendant or the attorney for the Commonwealth, that there
 18 is probable cause to believe that the defendant, whether a juvenile transferred pursuant to § 16.1-269.1 or
 19 adult, lacks substantial capacity to understand the proceedings against him or to assist his attorney in his
 20 own defense, the court shall order that a competency evaluation be performed by at least one psychiatrist
 21 or clinical psychologist who (i) has performed forensic evaluations; (ii) has successfully completed
 22 forensic evaluation training recognized by the Commissioner of Behavioral Health and Developmental
 23 Services; (iii) has demonstrated to the Commissioner competence to perform forensic evaluations; and
 24 (iv) is included on a list of approved evaluators maintained by the Commissioner.

25 B. Location of evaluation. — The evaluation shall be performed on an outpatient basis at a mental
 26 health facility or in jail unless an outpatient evaluation has been conducted and the outpatient evaluator

27 opines that a hospital-based evaluation is needed to reliably reach an opinion or unless the defendant is in
28 the custody of the Commissioner of Behavioral Health and Developmental Services pursuant to § 19.2-
29 169.2, 19.2-169.6, 19.2-182.2, 19.2-182.3, 19.2-182.8, 19.2-182.9, or Article 5 (§ 37.2-814 et seq.) of
30 Chapter 8 of Title 37.2.

31 C. Provision of information to evaluators. — The court shall require the attorney for the
32 Commonwealth to provide to the evaluators appointed under subsection A any information relevant to the
33 evaluation, including, but not limited to (i) a copy of the warrant or indictment; (ii) the names and
34 addresses of the attorney for the Commonwealth, the attorney for the defendant, and the judge ordering
35 the evaluation; (iii) information about the alleged crime; and (iv) a summary of the reasons for the
36 evaluation request. The court shall require the attorney for the defendant to provide any available
37 psychiatric records and other information that is deemed relevant. The court shall require that information
38 be provided to the evaluator within 96 hours of the issuance of the court order pursuant to this section.

39 D. The competency report. — Upon completion of the evaluation, the evaluators shall promptly
40 submit a report in writing to the court and the attorneys of record concerning (i) the defendant's capacity
41 to understand the proceedings against him; (ii) ~~his~~ the defendant's ability to assist his attorney; ~~and~~ (iii)
42 ~~his~~ the defendant's need for treatment in the event he is found incompetent but restorable; or incompetent
43 for the foreseeable future; and (iv) if the defendant has been charged with a misdemeanor violation of
44 Article 3 (§ 18.2-95 et seq.) of Chapter 5 of Title 18.2 or a misdemeanor violation of § 18.2-119, 18.2-
45 137, 18.2-388, 18.2-415, or 19.2-128, whether the defendant should be evaluated to determine whether he
46 meets the criteria for temporary detention pursuant to § 37.2-809 in the event he is found incompetent but
47 restorable or incompetent for the foreseeable future.

48 If a need for restoration treatment is identified pursuant to clause (iii), the report shall state whether
49 inpatient or outpatient treatment (community-based or jail-based) is recommended. Outpatient treatment
50 may occur in a local correctional facility or at a location determined by the appropriate community services
51 board or behavioral health authority. In cases where a defendant is likely to remain incompetent for the
52 foreseeable future due to an ongoing and irreversible medical condition, and where prior medical or
53 educational records are available to support the diagnosis, or if the defendant was previously determined

54 to be unrestorably incompetent in the past two years, the report may recommend that the court find the
55 defendant unrestorably incompetent to stand trial and the court may proceed with the disposition of the
56 case in accordance with § 19.2-169.3. ~~In cases where a defendant has been charged with a misdemeanor~~
57 ~~violation of Article 3 (§ 18.2-95 et seq.) of Chapter 5 of Title 18.2 or a misdemeanor violation of § 18.2-~~
58 ~~119, 18.2-137, 18.2-388, 18.2-415, or 19.2-128 and is incompetent, the report may recommend that the~~
59 ~~court direct the community services board or behavioral health authority for the jurisdiction in which the~~
60 ~~defendant is located to (a) conduct an evaluation of the defendant in accordance with subsection B of §~~
61 ~~37.2-808 to determine whether the defendant meets the criteria for temporary detention and (b) upon~~
62 ~~determining that the defendant does meet the criteria for temporary detention, file a petition for issuance~~
63 ~~of an order for temporary detention of the defendant in accordance with § 37.2-809. No statements of the~~
64 defendant relating to the time period of the alleged offense shall be included in the report. The evaluator
65 shall also send a redacted copy of the report removing references to the defendant's name, date of birth,
66 case number, and court of jurisdiction to the Commissioner of Behavioral Health and Developmental
67 Services for the purpose of peer review to establish and maintain the list of approved evaluators described
68 in subsection A.

69 E. The competency determination. — After receiving the report described in subsection D, the
70 court shall promptly determine whether the defendant is competent to stand trial. A hearing on the
71 defendant's competency is not required unless one is requested by the attorney for the Commonwealth or
72 the attorney for the defendant, or unless the court has reasonable cause to believe the defendant will be
73 hospitalized under § 19.2-169.2. If a hearing is held, the party alleging that the defendant is incompetent
74 shall bear the burden of proving by a preponderance of the evidence the defendant's incompetency. The
75 defendant shall have the right to notice of the hearing, the right to counsel at the hearing and the right to
76 personally participate in and introduce evidence at the hearing.

77 The fact that the defendant claims to be unable to remember the time period surrounding the
78 alleged offense shall not, by itself, bar a finding of competency if the defendant otherwise understands the
79 charges against him and can assist in his defense. Nor shall the fact that the defendant is under the influence

80 of medication bar a finding of competency if the defendant is able to understand the charges against him
81 and assist in his defense while medicated.

82 F. Finding. — If the court finds the defendant competent to stand trial, the case shall be set for trial
83 or a preliminary hearing. If the court finds the defendant either incompetent but restorable or incompetent
84 for the foreseeable future, the court shall proceed pursuant to § 19.2-169.2.

85 **§ 19.2-169.2. (Effective until July 1, 2023) Disposition when defendant found incompetent.**

86 A. Upon finding pursuant to subsection E or F of § 19.2-169.1 that the defendant, including a
87 juvenile transferred pursuant to § 16.1-269.1, is incompetent, the court shall order that the defendant
88 receive treatment to restore his competency on an outpatient basis or, if the court specifically finds that
89 the defendant requires inpatient hospital treatment, at a hospital designated by the Commissioner of
90 Behavioral Health and Developmental Services as appropriate for treatment of persons under criminal
91 charge. Outpatient treatment may occur in a local correctional facility or at a location determined by the
92 appropriate community services board or behavioral health authority. Notwithstanding the provisions of
93 § 19.2-178, if the court orders inpatient hospital treatment, the defendant shall be transferred to and
94 accepted by the hospital designated by the Commissioner as soon as practicable, but no later than 10 days,
95 from the receipt of the court order requiring treatment to restore the defendant's competency. If the 10-
96 day period expires on a Saturday, Sunday, or other legal holiday, the 10 days shall be extended to the next
97 day that is not a Saturday, Sunday, or legal holiday. Any psychiatric records and other information that
98 have been deemed relevant and submitted by the attorney for the defendant pursuant to subsection C of §
99 19.2-169.1 and any reports submitted pursuant to subsection D of § 19.2-169.1 shall be made available to
100 the director of the community services board or behavioral health authority or his designee or to the
101 director of the treating inpatient facility or his designee within 96 hours of the issuance of the court order
102 requiring treatment to restore the defendant's competency. If the 96-hour period expires on a Saturday,
103 Sunday, or other legal holiday, the 96 hours shall be extended to the next day that is not a Saturday,
104 Sunday, or legal holiday.

105 B. If, at any time after the defendant is ordered to undergo treatment under subsection A, the
106 director of the community services board or behavioral health authority or his designee or the director of

107 the treating inpatient facility or his designee believes the defendant's competency is restored, the director
108 or his designee shall immediately send a report to the court as prescribed in subsection D of § 19.2-169.1.
109 The court shall make a ruling on the defendant's competency according to the procedures specified in
110 subsection E of § 19.2-169.1.

111 C. Notwithstanding the provisions of subsection A, in cases in which (i) the defendant has been
112 charged with a misdemeanor violation of Article 3 (§ 18.2-95 et seq.) of Chapter 5 of Title 18.2 or a
113 misdemeanor violation of § 18.2-119, 18.2-137, 18.2-388, 18.2-415, or 19.2-128; (ii) the defendant has
114 been found to be incompetent pursuant to subsection E or F of § 19.2-169.1; and (iii) the competency
115 report described in subsection D of § 19.2-169.1 recommends that the defendant be ~~temporarily detained~~
116 evaluated to determine whether he meets the criteria for temporary detention pursuant to § 37.2-809, the
117 court may ~~dismiss the charges without prejudice against the defendant and, in lieu of ordering the~~
118 ~~defendant receive treatment to restore his competency,~~ order the community services board or behavioral
119 health authority serving the jurisdiction in which the defendant is located to (a) conduct an evaluation of
120 the defendant and (b) if the community services board or behavioral health authority determines that the
121 defendant meets the criteria for temporary detention, file a petition for issuance of an order for temporary
122 detention pursuant to § 37.2-809. The community services board or behavioral health authority shall
123 within 72 hours notify the court, in writing, upon completion of the evaluation and, if appropriate, file a
124 petition for issuance of an order for temporary detention. Upon receipt of such notice, the court may
125 dismiss the charges without prejudice against the defendant. However, the court shall not ~~dismiss charges~~
126 ~~and~~ enter an order or dismiss charges against a defendant pursuant to this subsection if the attorney for the
127 Commonwealth is involved in the prosecution of the case and the attorney for the Commonwealth does
128 not concur in the motion.

129 D. If a defendant for whom an evaluation has been ordered pursuant to subsection C fails or refuses
130 to appear for the evaluation, the community services board or behavioral health authority shall notify the
131 court and the court shall issue a mandatory examination order and capias directing the primary law-
132 enforcement agency for the jurisdiction in which the defendant resides to transport the defendant to the
133 location designated by the community services board or behavioral health authority for examination.

